No. 14733

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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BERT STRAND, Sheriff of San Diego County, State of California,

*Appellant,*

*vs.*

WILLIAM SCHMITTROTH,

*Appellee.*

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## BRIEF OF AMICUS CURIAE.

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### Jurisdiction.

The basic jurisdiction of the District Court is founded upon Title 18, U. S. C. A., Section 3231 (June 25, 1948, C. 645, 62 Stat. 826) and Title 18, U. S. C. A., Section 7 (June 25, 1948), and initially arose in this case by reason of a violation of Title 18, U. S. C. A., Section 2314 (June 25, 1948, C. 645, 62 Stat. 806 amended May 24, 1949, C. 139, Section 45, 63 Stat. 96). Probation was granted under Title 18, U. S. C. A., Section 3651 (June 25, 1948, C. 645, 62 Stat. 842) and a petition for habeas corpus brought by the probationer under Title 28, U. S. C. A. 2241 (June 25, 1948, C. 646, 62 Stat. 964 amended May 24, 1949, C. 139, Section 112, 63 Stat. 105).

The jurisdiction of this Court was invoked under the provisions of Title 28, U. S. C. A., Section 1291 (June 25, 1948, C. 646, 62 Stat. 929), and Rules 37 and 39 of

the Federal Rules of Criminal Procedure, Title 18, U. S. C. A. (as amended December 27, 1948, eff. January 1, 1949).

This brief is filed as *Amicus Curiae* pursuant to an order of this Honorable Court, dated October 1, 1956.

## Statement of the Case.

This appeal was originally presented to this Honorable Court by appellant, the Sheriff of San Diego County, California, from an order of the District Court for the Southern District of California, Pierson Hall, Judge, granting a writ of habeas corpus to the appellee Schmittroth, a federal probationer, commanding his release by the said Sheriff of San Diego County who held him pending his trial for a prior State offense.

The pertinent facts are as follows:

On August 29, 1953, appellee Schmittroth (hereinafter sometimes referred to as appellee) cashed a check in a San Diego, California, drug store, payable to William Roth (an oft used alias of appellee) in the sum of $135.00 and signed C. Robert Johnson. Also on August 29, 1953, appellee cashed a check at the Senator Cafe in San Diego, drawn to the order of William Roth in the sum of $135.00 and likewise signed C. Robert Johnson. Both checks were drawn on the United States National Bank in San Diego and upon presentment thereto both checks were dishonored, there being no account in the name of C. Robert Johnson.

As a result of these two transactions a complaint was issued on September 15, 1953 by the Municipal Court of the San Diego Judicial District charging "William Roth" (Appellee) with the crime of Uttering a Check Bearing

a Fictitious Name. At that time a warrant issued directing the arrest of appellee.

Appellee was not immediately apprehended on the San Diego warrant of September 15 and on February 9, 1954, in St. Petersburg, Florida, he caused to be transported in interstate commerce a falsely made check in the amount of $60.00 drawn on the Northwest Bank and Trust Company, Davenport, Iowa, signed A. R. Bruns and made payable to William Schmittroth (appellee).

On November 24, 1954, pursuant to the provisions of Criminal Rule 20, Title 18, U. S. C. A., appellee consented to the transfer of the case, arising out of the transaction of February 9th, from the Southern District of Florida to the Southern District of California for the purpose of entering a plea of guilty to an indictment charging him with a violation of Title 18, U. S. C. A., Section 2314.

On January 17, 1955, appellee was convicted upon his plea of guilty in the United States District Court for the Southern District of California and was sentenced by the Honorable James M. Carter to imprisonment for a period of ten years said sentence to be suspended and defendant placed upon probation for a period of five years.[1]

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[1]The pertinent portion of the judgment of the court read as follows:

> "It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten years; and it is ordered that the execution of said sentence be and hereby is suspended and the defendant is placed on probation for a period of five years, on condition that the defendant obey all laws, local, state and Federal, that he comply with the rules and regulations of the Probation Officer and report thereto as required and that the defendant confine his activities to

On January 17, 1955, the same date appellee was placed upon Federal Probation, he was delivered into the custody of the San Diego Police Department upon the outstanding warrant of September 15, 1953 (*supra*). Appellee thereafter admitted that he had written and passed the two bad checks on August 29, 1953.

On February 8, 1956 appellee petitioned the United States District Court for the Southern District of California, Southern Division, for a Writ of Habeas Corpus alleging that he was unlawfully detained and confined by

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rural and mountain country. The Probation officer will arrange to transfer supervision to the Northern District of California at defendant's convenience."

The rules and regulations of the Probation Officer above referred to are contained in the Conditions of Probation [Tr. 9] viz.:

CONDITIONS OF PROBATION
United States District Court for the
Southern District of California
Docket No. 23975

To Mr. Wm. Nicholas Schmittroth.
Address.....

In accordance with authority conferred by the United States Probation Law, you have been placed on probation on this date, January 17th, 1955, for a period of 5 years by the Hon. James M. Carter, United States District Judge, sitting in and for this District Court at Los Angeles, California.

It is the order of the Court that you shall comply with the following general and special conditions of probation. The general conditions are as follows: (a) Refrain from the violation of any state and federal penal laws. (b) Live a clean, honest and temperate life. (c) Keep good company and good hours. (d) Keep away from all undesirable places. (e) Work regularly. When out of work, notify your probation officer at once. (f) Do not leave or remain away from the city or town where you reside without permission of the probation officer. Notify your probation officer at once if you intend to change your address. (g) contribute regularly to the support of those for whose support you are legally responsible. (h) Follow the probation officer's instructions and advice. The Probation Law gives him authority to instruct and advise you regarding your recreational and social activities. (i) Report promptly on the dates set forth. If for any unavoidable rea-

Bert Strand, the sheriff of San Diego County (hereinafter sometimes referred to as appellant) inasmuch as he was, at the time of his seizure and confinement, a Federal Probationer and as such was in the sole and exclusive custody of the United States and was accordingly immune to prosecution by the State unless the United States expressly consented to the prosecution which it had not done. An order to show cause issued to which appellant Strand answered alleging that he held appellee upon a valid order of a Court of California and that detention by a State official of a prisoner who is subject to the

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son you are unable to do so, communicate with your probation officer without delay.

The special conditions ordered by the Court are as follows: Execution of sentence is suspended and you are placed on probation for 5 years on condition that you obey all laws, local, state and Federal, that you comply with the rules and regulations of the Probation Officer and report thereto as required, and that you confine your activities to rural and mountain country. The Probation Officer will arrange to transfer supervision to the Northern District of California at your Convenience.

You are hereby advised that under the law of the Court may at any time revoke probation for cause, modify the conditions of probation, and reduce or extend the period of probation. You are subject to arrest by the probation officer without a warrant. At any time during the period of probation or within 5 years from the date you were placed on probation the court may issue a warrant and revoke probation for a violation occurring during the period of probation.

The Court has placed you on probation, believing that if you sincerely try to obey and live up to the conditions of your probation, your attitude and condition will improve both to the benefit of the United States and of yourself.

You will report as follows: You will render written reports on the last day of each month and mail or bring to Mr. C. H. Meador, Chief U. S. Probation Officer, 533 Post Office Building, Los Angeles 12, California.

C. H. Meador,
*Chief U. S. Probation Officer.*
/s/ Wm. N. Schmittroth,
*Probationer.*

[Endorsed]: Filed February 10, 1955.[8]

custody of the Federal Court is not illegal until such time as the Federal Court shall refuse permission for the detention which had not been done. Thereafter, on February 17, 1955 the matter came on for hearing before the Honorable Pierson Hall, and after considering the papers on file and the oral arguments of counsel, Judge Hall ordered appellant to discharge appellee from any confinement by reason of the San Diego commitment. Appellant's "Petition for Rehearing" by the District Court being denied and the final judgment being entered on March 11, 1955, Strand appealed to this Honorable Court. Up to this point the United States had not participated in the proceedings but pursuant to the request of this Honorable Court, on January 30, 1956, this office filed an *Amicus Curiae* brief on behalf of the United States.

In May 3, 1956, Judge Bone handed down the opinion of the majority affirming the order of Judge Hall granting appellee's petition for a Writ of Habeas Corpus. Judge Healy joined in the majority. Judge Chambers dissented. (*Strand v. Schmittroth,* No. 14,733, 9th Cir., May 3, 1956, 233 F. 2d 598.)

Appellant filed his petition for a rehearing by the Court en banc which was denied by the majority on August 2, 1956. Judge Chambers again dissented (*Strand v. Schmittroth,* No. 14,733, 9th Cir., August 2, 1956, 235 F. 2d 756).

Appellant then filed a petition for a Writ of Certiorari in the Supreme Court of the United States. Thereafter, before the Supreme Court acted on said petition, on October 1, 1956 Judges Bone and Chambers constituting a

majority of the panel which had heard the case, vacated the panel's August 2nd Order which had denied the petition for rehearing and informed the Chief Judge that a rehearing en banc was desired. On the same date Judges Denman, Stephens, Pope, Fee and Chambers joined in signing an order for a rehearing en banc and granting the appellee and the United States, as *Amicus Curiae,* permission to file additional briefs. This brief is filed pursuant to that order.

## Summary of Argument.

### I.

INTRODUCTION, AND RESTATEMENT OF THE ARGUMENTS ADVANCED IN THE PRIOR PROCEEDINGS IN THIS CASE.

### II.

A PERSON ENLARGED UPON PROBATION IS NOT, BY REASON OF HIS PROBATION, IMMUNE FROM APPREHENSION, PROSECUTION, AND INCARCERATION BY THE AUTHORITIES OF A SECOND SOVEREIGN WHOSE LAWS HE HAS VIOLATED.

### III.

EXAMPLES.

#### (a)

"SUPPOSE A STATE PROBATIONER VIOLATES THE FEDERAL KIDNAPPING STATUTE. THE FEDERAL BUREAU OF INVESTIGATION FINDS THE KIDNAPPER. CAN ITS OFFICERS ARREST THE CULPRIT? MUST THEY GET THE PERMISSION OF A STATE JUDGE TO ARREST HIM? IF THEY CAN ARREST HIM BUT MUST GET PERMISSION TO PROSECUTE, HOW LONG CAN THEY HOLD THE KIDNAPPER WHILE THEY WAIT FOR PERMISSION? IF THE JUDGE WHO HEARS THE HABEAS CORPUS DECIDES THE OTHER JURISDICTION . . . SHOULD PROSECUTE, THEN MAY THE PRISONER APPEAL CLAIMING AN ABUSE OF DISCRETION?"

(b)

"CAN A JUVENILE STATE PROBATIONER GO OUT, ROB A NATIONAL BANK, GET CAUGHT BY THE FEDERAL BUREAU OF INVESTIGATION, AND THEN TAUNT HIS ARRESTOR WITH 'YOU CAN'T ARREST ME. MY JUVENILE JUDGE SAID YOU COULDN'T TOUCH ME.'"

(c)

"WILL WE DENY THE GREAT WRIT [HABEAS CORPUS] TO ONE WHO COMMITS THE STATE OFFENSE AFTER HE GOES ON FEDERAL PROBATION BUT GRANT IT IF HIS STATE OFFENSE PRECEDES HIS FEDERAL OFFENSE IN POINT OF TIME?"

(d)

"SUPPOSE THE FEDERAL PROBATIONER IS AT SAN DIEGO AND THE SUBSEQUENT STATE OFFENSE AND ARREST ARE IN ALAMEDA COUNTY, CALIFORNIA, IN THE NORTHERN DICTRICT OF CALIFORNIA. THE APPLICATION FOR HABEAS CORPUS MUST BE MADE IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT. HOW WILL THAT WORK? WILL A JUDGE OF THE FEDERAL COURT IN THE NORTHERN DISTRICT EXERCISE THE SOUTHERN DISTRICT'S . . . DISCRETION AS TO WHETHER STATE PROSECUTION SHOULD GO AHEAD?"

(e)

"WHETHER THE JURISDICTION OF THE SECOND SOVEREIGN TO DETAIN AND TRY A PROBATIONER OF THE FIRST SOVEREIGN PREVAILS IN ABSENCE OF EXPRESS ASSENT BY THE FIRST SOVEREIGN?"

(f)

"WHETHER PROBATION FROM THE FIRST SOVEREIGN COMPLETELY INSULATES THE PROBATIONER FROM PROSECUTION BY SUBSEQUENT SOVEREIGNS DURING THE TERM OF HIS PROBATION?"

(g)

"WHETHER A PERSON ON PROBATION IS TO BE CONSIDERED IN THE CUSTODY OF THE LAW FOR ALL PURPOSES?"

## ARGUMENT.

### I.

### Introduction and Restatement of the Arguments Advanced in Prior Proceedings in This Case.

At the outset it is helpful to consider briefly the arguments which have previously been advanced in this case both at the District Court level and in the initial hearing on appeal.

The precipitating factor here was the act of the State of California in attempting to exercise jurisdiction over appellee while he was subject to the control of the United States by reason of his Federal probation. The conflict results from the attempts to reconcile with appellee's probational status the long standing rule regulating Federal-State judicial relations, that the first court having jurisdiction of a person cannot, without its consent, be deprived by a second Court of the right to deal with that person until its jurisdiction be exhausted.

Judge Hall in ordering appellant to discharge appellee concluded that appellee was confined by the State of California without jurisdiction.

In this he assumed that appellee as a Federal probationer was within the custody and control of the United States and accordingly on the basis of *Grant v. Guernsey* (10th Cir., 1933), 63 F. 2d 163 (which allowed a writ of habeas corpus upon almost identical facts), he concluded that the State of California lacked immediate jurisdiction to try appellee in absence of the express consent of the United States which as the sovereign first acquiring jurisdiction over appellee had the right to exhaust its remedies upon him to the exclusion of the State.

Both appellant and appellee admit the well established principle that in our dual system of Government the sovereign (hereinafter termed "first sovereign") which first acquires jurisdiction over a criminal cannot be deprived of the right to deal with such person until its jurisdiction is exhausted and that no other Court has the right to interfere with such custody or possession. At this point their respective interpretations of the law diverge. Appellant views "The Rule" as one of comity and reasons that under "The Rule" the first sovereign acquires jurisdiction to deal with the person in question but not to the exclusion of the second sovereignty acquiring custody of the person (hereinafter called the second sovereign). It is his theory that the second sovereign likewise has jurisdiction but must merely delay its exercise until the first sovereign has exhausted its remedy. Thus if physical custody of the person be acquired by the second sovereign it could, *in absence of objection by the first sovereign,* try him without further ado. Appellant further contends that the person thus held lacks standing to raise the question of the rights of the first sovereignty, it being a matter solely between the two sovereigns. In any event he urges that even if the restrained person has in some way the right to raise the question of the first sovereigns interest, a Writ of Habeas Corpus from the first sovereign is not the proper manner in which the matter should be raised. This of course would follow if the second sovereign's jurisdiction was valid.

Appellee on the other hand sees "The Rule" as jurisdictional and contends that the jurisdiction of the first sovereign acquiring jurisdiction is exclusive since "it is a fundamental principle of law that jurisdiction of a *res* can be in only one place at a time." and the jurisdiction of the second sovereign arises only upon the

exhaustion or relinquishment of the jurisdiction of the first sovereign. The importance of this distinction is apparent since under appellee's theory if the second sovereign obtained custody of the person in question at any time prior to the exhaustion or relinquishment of the first sovereign's jursidiction, it would hold him without jurisdiction and being thus restrained the person could properly obtain his release by habeas corpus from the courts of the first sovereign. Thus in the event the second sovereign possessed custody of the person and wished to try him, it could acquire the jurisdiction to do so only by obtaining the permission of the first sovereign, the action of the first sovereign being in effect a waiver of jurisdiction in favor of the second sovereign.

The District Court in granting the writ evidently took the view, that the jurisdiction of the second sovereign (the State here) over the appellee, was deferred until the United States was through with him and in accord with this view held that prosecution by the second sovereign could only be predicated upon actual or implied consent by the first sovereign. As he stated [Tr. 29]:

> "In other words there must be an actual or an implied consent rather than a mere failure to object.
>
> "I hold that there must be a consent, that there has been no consent in this case, and under Grant v. Guernsey the petitioner is entitled to the Writ.
>
> "In doing that, I don't think that I am destroying the jurisdiction of the State. I am merely delaying it because as I view the State's statutes, you can preserve your jurisdiction and preserve the statute of limitations over this defendant by causing him to be indicted by your grand jury and merely holding that indictment until the expiration of the term of his probation."

The brief of the United States filed as *Amicus Curiae* on the previous consideration of this appeal, supported the views of the appellee Schmittroth and relied extensively on the Tenth Circuit case of *Grant v. Guernsey* (1933), 63 F. 2d 163 (*supra*) and took the position that a second sovereign acquiring jurisdiction over a person who, is at the time in the custody of another sovereign, may not proceed with its prosecution unless it has express or implied consent of the sovereign which first acquired jurisdiction. It was also urged that a Federal probationer may raise by applying for a Writ of Habeas Corpus in the Federal District Court, the question of the power of the State to prosecute him without the consent of the Federal authorities.

The opinion of the majority (*Strand v. Schmittroth* (9th Cir., May 3, 1956, No. 14,733), 233 F. 2d 598), relied in many particulars on the views expressed in the *Amicus* brief and specifically followed *Grant v. Guernsey* (10th Cir., 1933), 63 F. 2d 163 (*supra*). Additionally the majority opinion held that the State Court had jurisdiction over appellee and while appellee had no standing to raise the issue of the prior Federal jurisdiction, the action of the District Court in granting the Writ clearly indicated its objection to State action at that time, thus postponing the State's jurisdiction.

Attempts to apply the rationale of the opinion of *Grant v. Guernsey* to the practical problems of federal-state law enforcement compelled a reappraisal of the position taken by the government in the *amicus curiae* brief. We now conclude that our prior views lead to an unrealistic and unworkable result and that some other solution is necessary to insure the compatible administration of federal-state justice.

## II.

## A Person Enlarged Upon Probation Is Not, by Reason of His Probation, Immune From Apprehension, Prosecution, and Incarceration by the Authorities of a Second Sovereign Whose Laws He Has Violated.

As both appellant and appellee urge, it is of course the well established rule that as between two competing sovereigns the one which first acquires criminal jurisdiction over a person cannot be deprived of that jurisdiction by action of the other sovereign before it (the first sovereign) has exhausted or relinquished its jurisdiction. So fundamental to this case is the above stated rule that throughout the remainder of this brief it is often referred to merely as "The Rule."

The dual system of criminal justice inherent in our federal system of government if unrestrained could lead inevitably but to conflict between state and federal courts in the exercise of their respective criminal jurisdiction. This truism was early recognized and the aforestated rule evolved as a practical means of regulation where the two sovereigns simultaneously desired to adjudicate and regulate the same *res* or person. "The Rule" finds its basis in comity. While its initial development was in relation to dual judicial attempts to acquire the *res* in a civil action, "The Rule" later spread to and governs to a lesser extent federal-state relations in the administration of criminal justice. In the words of Mr. Justice Sutherland:

> "The principle that when the jurisdiction of a court has attached it must be respected as exclusive until exhausted, is a rule of comity, having a wide application in civil cases but a limited one in criminal cases. Peckham v. Henkel, 216 U. S. 483, 486.

> The mutual forbearance which two federal courts having coordinate jurisdiction should exercise to prevent conflicts by avoiding interference with the process of each other has 'perhaps no higher sanction than the utility which comes from Concord' Covell v. Hayman, 111 U. S. 176."
>
> *Morse v. United States* (1925), 267 U. S. 80, 82.

Thus "The Rule" is nothing more than an expeditious method of cooperation between state and federal courts.

"The Rule" was introduced into the Federal Courts in the middle of the last century and has been increasingly adhered to ever since. It will be of aid in considering the problem here presented to trace briefly the development of "the Rule."

It is generally conceded that the leading case in this field is the twin case of *Ableman v. Booth* and *United States v. Booth,* considered and decided together at the December, 1858 term of the Supreme Court and reported in 62 U. S. 506, in which the Supreme Court of Wisconsin undertook to release on habeas corpus certain Wisconsin citizens convicted by the United States District Court in violation of the fugitive slave law. Of this case it was said in *In re Johnson* (1897), 167 U. S. 120 that:

> "Ever since the case of *Ableman v. Booth,* 21 How. 506, it has been the settled doctrine of this court that a court having possession of a person or property cannot be deprived of the right to deal with such person or property until its jurisdiction is exhausted, and that no other court has the right to interfere with such custody or possession. This rule was reaffirmed in Tarbles case, 13 Wall. 397; in Robb v. Connolly, 111 U. S. 624; and *In re* Spangler,

> 11 Michigan 298, and with reference to personal property has become so often restated as to have become one of the maxims of law."

It is to be noted that *Ableman v. Booth, Tarbles* case and *Robb v. Connolly* (*all supra*), each are concerned with the situation where the person seeking release was physically confined in the first two cases by officers of the United States, in the latter case by officers of the State of Oregon.

See also: *Ex parte Royall* (1886), 117 U. S. 241 which was concerned with a person held in physical custody by the sergeant of Richmond, Va.

*Taylor v. Taintor* (1872), 83 U. S. 366 contains a trenchert exposition of "The Rule" at page 370 where it is stated:

> "Where a State court and a Court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted; and this rule applies alike in both civil and criminal cases. It is indeed a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

A landmark case in this field and one which was relied on both by appellee and by the trial court, is *Ponzi v. Fessenden* (1922), 258 U. S. 254. In that case Ponzi was held as a Federal prisoner in the State House of Correction by virtue of a mittimus issued by the Federal District Court. Subsequently to his aforesaid incarceration the State Court issued a Writ of Habeas Corpus

directing the master of the House of Correction to produce Ponzi before the State Court to answer certain outstanding indictments. The Attorney General of the United States, through his agent, in open Court stated that the United States had no objection to the State proceeding. Ponzi, denied a Writ of Habeas Corpus, appealed alleging that since he was in the exclusive custody of the United States the State lacked jurisdiction to try him. Although the court upheld the denial of the writ on Ponzi's lack of standing to raise the question, Mr. Justice Holmes stated at page 260:

> "The chief rule which preserves our two systems of courts from actual conflict of jurisdiction is that the court which first takes the subject matter of the litigation into its control, whether this be person or property, must be permitted to exhaust its remedy, to attain which it assumed control, before the other court shall attempt to take it for its purpose."

"The Rule" as evolved has found wide application in the Circuit and District Courts. *United States v. Murphy* (7th Cir., 1954), 217 F. 2d 247; *Werntz v. Looney* (10th Cir., 1953), 208 F. 2d 102; *United States v. Fenno* (2nd Cir., 1948), 167 F. 2d 593; *Rawls v. United States* (10th Cir., 1948), 166 F. 2d 532; *Stamphill v. Johnston* (9th Cir., 1943), 136 F. 2d 291; *Lunsford v. Hudspeth* (10th Cir., 1942), 126 F. 2d 653; *Wall v. Hudspeth* (10th Cir., 1940), 108 F. 2d 865; *Cato v. Smith* (9th Cir., 1939); 104 F. 2d .....; *Rohr v. Hudspeth* (10th Cir., 1939), 105 F. 2d 747; *Grant v. Guernsey* (10th Cir., 1933), 63 F. 2d 163; *United States v. Robinson* (D. C. W. D. Ark., 1947), 74 Fed. Supp. 427; *Ex parte Sifford* (D. C. S. D. Ohio, 1857), 22 Fed. Cas. 105, Case No. 12,848. While the above list is by no means complete

it presents a representative cross-section of the cases and completely establishes the long and continued adherence to "The Rule" on the basis of "comity."

Consider then the nature of the basis of "The Rule." Comity has been defined as a willingness to grant a privilege, not as a matter of right, but out of deference and good will. *Dow v. Lillie,* 26 N. D. 513, 144 N. W. 1082; *Cox v. Terminal Railroad Assn. of St. Louis,* 331 Mo. 910, 55 S. W. 2d 685. At its best it is a nebulous concept based upon judicial courtesy and accommodation while at its worst it becomes a judicial catchall subject to many abuses and which has moved at least one authority to comment:

> " 'The term "comity," as already pointed out, is open to the charge of implying that the judge, when he applies foreign law to a particular case, does so as a matter of caprice or favor.' It is rather a scapegoat, an opportunity of escape for the court."
>
> *Conklin et al. v. United States Shipbuilding Co.* (C. C. D. Me., 1903), 123 Fed. 913.

Comity, as a basis for compatible administration of our dual judicial system is undoubtedly above reproach when, as in the cases above cited in support of "The Rule," it is similarly interpreted and obeyed by both sovereigns. When they cooperate there is no need to go further than the rule of comity in working out any differences which may arise. But what is to be done when as appellant so succinctly puts it, there is "a rude clash between jurisdictions" and one sovereign acts in a manner inconsistent with the principles of this nebulous concept of "comity." Since comity is based upon a form of judicial etiquette are sanctions available to compel obedience to "The Rule" or is the sovereign who has been denied, without remedy?

The instant case presents such a question. Under ideal conditions of comity no doubt the Court below would have in the exercise of its discretion deferred to the wishes of the state and allowed the prosecution in the State Court, or failing that, the state upon learning of appellee's federal probation would on the basis of comity voluntarily defer prosecution until such time as the federal court was through with appellee. However, while idealistically that result may be desired it is apparent that realistically it is not to be achieved here. Comity being a child of agreement, not disagreement, it is submitted that some other answer is necessary to the solving of the problems presented here.

This is not to deny however the validity of the above stated rule. It has become too deeply engrained to be doubted. The difficulty which has arisen in this case stems not from "The Rule" that the first sovereign to acquire custody of the criminal maintains jurisdiction until its remedies are exhausted. It stems rather from attempts to reconcile "The Rule" with the conceptualistic approach to the status of probation. It is the theory of conceptualism that equates the status of a Federal probationer's probation to actual institutional incarceration and concludes that a person enlarged and at relative liberty on probation, is in federal custody to the identical extent as a prisoner behind bars at Alcatraz, McNiel Island or Leavenworth.

Inasmuch as probation is a privilege given at the option of the court in hopes of rehabilitation and in lieu of an actual prison term, it is perhaps only natural to, in the words of Judge Chambers, "embrace a fiction that one who is on probation is in the custody of the law." The fiction is strengthened when it is considered that a sen-

tencing court may in its discretion commit a convict to prison or enlarge him upon probation for up to five years. However, fictions which appeal to logic in the situation for which they are developed can, by being extended beyond the intendments of their original, reach illogical conclusions. At that point, to quote the dissent in the instant case:

> "When that fiction produces unseemly judicial conflict as this does, the fiction ought to give way. One can be subject to a court's orders without being in the full 'custody of the law' without having a protective casing of 'immunity.'"

Prior to 1925 there was no provision for probation in the Federal Courts. On March 4th of that year the President signed Public Law 596 of the Sixty-eighth Congress (Senate bill 1042) which was captioned:

> "An act to provide for the establishment of a probation system in the United States Courts, except in the District of Columbia."
>
> See 43 Stats. 1259, Chap. 521.

Of significance is the first paragraph of Section 1 of the Act which in pertinent portion provides:

> ". . . That the courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia, when it shall appear to the satisfaction of the Court that *the ends of justice and the best interests of the public,* as well as the defendant, will be subserved thereby, shall have power, after conviction . . . for any crime . . . not punishable by death or life imprisonment, to suspend the imposition . . . of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best . . ." [Emphasis added.]

In its present form this enactment is contained in Title 18, U. S. C. A., Section 3651.

It is apparent from the wording of the Act that it was designed to accomplish its purpose of rehabilitating the defendant only when the ends of justice and the best interests of the public would be served thereby. It was certainly never meant to defeat justice nor to work to the detriment of the public. Yet, in the present strained construction which is forced upon us by attempts to reconcile the conception that a probationer is in the full custody of the court, with "The Rule" that the first sovereign to acquire custody of a defendant can exhaust its remedies to the exclusion of other sovereigns, we have a situation where not only is justice in danger of being thwarted but the public weal is threatened as well. It is all too apparent that in construing these two concepts together in the instant case that appellant is correct when he accuses the majority opinion of creating "ambulatory enclaves." If one on federal probation is to be removed, by reason of his probationary status, from state regulation there is indeed a cloak or shield of immunity surrounding each and every probationer, State as well as Federal, which renders them immune from any prosecution save by the permission of their sentencing courts. The instant case bears witness to the fact that such permission is not always readily forthcoming.

In this conflict between the well established rule of acquisition of jurisdiction, and the conceptualistic fiction of probation constituting custody, it is the fiction which must yield. The United States submits that there is nothing in the concept of probation which would render a probationer, who violates the law of another sovereign, immune from apprehension, prosecution and incarcera-

tion by the second sovereign. To hold otherwise would be to grant to one on probation preferred status in relation to law enforcement, superior to that possessed by the great majority of citizens who, having committed no crime, are subject to the laws, regulations and prohibitions of both sovereigns. If Federal probationers are, like appellee, immune to State prosecutions without permission of the sentencing court they are for practical purposes immune not only to felony prosecutions but also misdemeanor prosecutions. Carried to this illogical extreme a probationer may ignore state vehicle laws, sanitary laws and local ordinances. Nor is it any answer to say that at the end of his probation he would be available for prosecution since the importance of the offense may not be such as to normally withstand a lengthy deferral in prosecution. Thus, the avowed intention of the probation law to rehabilitate offenders to useful citizens is defeated by the very operation of the law. The estate of probation should not be perverted into ark of refuge for the unlawful. In the language of the Court in *United States v. Toman* (D. C., N. D. Ill., E. D., 1938), 23 Fed. Supp. 119, 121:

> "To paraphrase language used in Poniz v. Fessenden, 258 U. S. 254, 264, 42 S. Ct. 309, 312, 66 L. Ed. 607, 22 A. L. R. 87, the probation order should not now be used as a sanctuary or as a means of conferring immunity from the laws of the state of Illinois."

The United States therefore respectfully submits that this Honorable Court should declare that the fiction that a probationer is in the full custody of the law should give way in this instance. While one on probation is undoubtedly subject to the orders and control of certain

officers of the sentencing court, it certainly follows that the control over him is not as complete nor the regulation as strict as is the case with one actually held in physical custody. A requirement to report monthly to a probation officer does not restrain the individual to the same extent as actual confinement behind bars. It is submitted that actual phsyical custody of the person is requisite for the operation of "The Rule." When the sovereign first acquiring custody of the person relinquishes actual physical custody of the probationer, it subordinates its rights to rehabilitate the probationer to the rights of the second sovereign to compel obedience to its laws.

The views expressed above as to the status of a probationer, are not without precedent.

In *United States v. Bradford* (2d Cir., 1952), 194 F. 2d 197, in denying Bradford, a probationer, the right to invoke Title 28, U. S. C. A., Section 2255, because probation was not custody, Judge Hand stated at page 200:

> "We have no occasion to express any opinion as to that; for Bradford was not 'in custody' of any sort whatsoever . . ."

In *United States v. Binion* (D. C. Nev., 1952), 13 F. R. D. 238, Judge Yankwich said at page 242:

> "There are cases which hold that while a person is under probation he is in the custody of the court which granted probation and that a prosecution by a state court during that period would be unauthorized. Grant v. Guernsey, 10 Cir., 1933, 63 F. 2d 163; Dillingham v. United States, 5 Cir., 1935, 76 F. 2d 35; United States *ex rel.* Hall v. McGowan, 1948, D. C. Minn., 80 F. Supp. 792; United States

*ex rel.* Speece v. Toman, 1938, D. C. Ill., 23 F. Supp. 119.

"I am unwilling to extend the doctrine of these cases to Federal proceedings for as a defendant might be guilty of distinct offenses in several districts, the government should not be prevented from instituting multiple prosecutions merely because a prosecution in one district has resulted in a probationary sentence."

A recognition of the problem here presented, and a significant suggestion for its solution is found in the case of *United States v. Schurman* (D. C. S. D. N. Y., 1949), 84 Fed. Supp. 411, viz.:

"Finally, petitioner appears to contend that upon his original federal conviction on May 31, 1946, the court lacked power to try him because he was then a state parolee, and lacked power to sentence him or to admit him to probation for 22 months concurrently with his New York parole. Apparently, petitioner asserts that one on parole or probation is in the constructive custody of the paroling or probationing authority, and that one cannot be in the control of two sovereign authorities at the same time. *cf.* Grant v. Guernsey, 10 Cir. 1933, 63 F. 2d 163, certiorari denied, 1933, 289 U. S. 744, 53 S. Ct. 688, 77 L. Ed. 1491.

"Accepting that premise, it might follow that petitioner's violation of federal probation was the violation of a void judgment and no offense, that his conviction and sentence for such violation was void and should be vacated, and that petitioner will not have to complete service of that sentence upon his prospective release from New York custody. The first leg of petitioner's argument, that the court lacked power

to try him while he was a New York parolee, rests on the conceptualistic motion that such a trial would invade the constructive custody of the New York authorities. The same argument has been rejected where the state's custody is actual and not constructive. State prisoners, actually confined in a state jail have been tried in federal courts. Lunsford v. Hudspeth, Wall v. Hudspeth, *supra, cf.* Ponzi v. Fessenden, *supra.*

"Conceptualism is satisfied in that situation by finding an implied consent on the part of the state authorities to the limitation, suspension or cessation of their custody as the circumstances indicate. Zerbst v. McPike, 5 Cir. 1938, 97 F. 2d 253.

"Where the defendant is a state prisoner, consent is found in his physical surrender to federal authorities. Where the defendant is a state parolee, consent must be found in the state's granting the parole, and in its failure to object to federal custody. To hold otherwise would be to create an intolerable and most dangerous situation whereunder the considerable number of state parolees would be at large but immune to federal prosecution and punishment for the violation of federal law. Federal-state comity would not be furthered by such practice. Moreover the same reasoning would also clothe federal parolees with immunity against state prosecution for the vastly greater number of offenses known to state law. No such incredible purposes were intended to be served by the humane provisions of the probation and parole statutes. Once we accept the conclusion that a federal court may incarcerate a state parolee, *a fortiori* it should be able to admit him to probation. Grant v. Guernsey *supra,* is inconsistent with these views; I must respectfully differ."

It is the position of the Government that "The Rule" that the first sovereign having possession of a person may exhaust its remedies against him to the exclusion of other sovereigns applies only where there is actual physical possession and custody. Once the first sovereign enlarges the person on probation it looses the requisite degree of custody and control, and inferentially consents to the assumption of jurisdiction by any other sovereign entitled thereto.

This position accords with that line of cases, cited in the majority opinion herein, to the effect that actual physical custody of a prisoner insuring his presence before a court having jurisdiction of the subject matter gives that court jurisdiction over the accused.

*Kerr v. Illinois* (1886), 119 U. S. 436;
*Mahon v. Justice* (1888), 127 U. S. 700;
*Pettibone v. Nichols* (1906), 203 U. S. 192;
*Moyer v. Nichols* (1906), 203 U. S. 211;
*In re Johnson* (1897), 167 U. S. 120.

It is clear that actual physical possession and custody of the prisoner is requisite to attain personal jurisdiction. It is submitted that in the instant case it is likewise requisite to *maintain* jurisdiction to the exclusion of a second sovereign desiring to prosecute.

Nor does this position in any way contravene those Supreme Court cases which established "The Rule" on priority of jurisdiction. That line of cases started with *Ableman v. Booth* (1858), 62 U. S. 506 (*supra*) and included *Ponzi v. Fessenden* (1922), 258 U. S. 254. Thus by 1922 "The Rule" had been evolved by the Supreme Court. Application of the rule by Circuit and District

Courts since that time has been in reliance on the authority established by those cases. However, the evolution of "The Rule" took place during a period when the actual physical custody over the contested person was not in dispute, for at the time those cases were determined there was no provision by which Federal Courts could place a convict on probation, thus invariably the person involved was actually incarcerated by one of the sovereigns and the matter of actual physical custody thus was not open to serious question. For instance: in *Ableman v. Booth* (*supra*), Booth was held in the physical custody of the United States Marshal first on a commissioner's commitment and then by judgment of the District Court; in *Tarbles* case (*supra*), Tarble was held in the physical custody of one Lieutenant Stone of the United States Army; in *Robb v. Connolly* (*supra*), the accused was physically held in California by an officer of the State of Oregon; in *In re Johnson* (*supra*), Johnson was held in physical custody by one United States Marshal in defiance of another; and, in *Ponzi v. Fessenden* (*supra*), the accused was imprisoned in the state workhouse on a federal commitment.

In 1925, three years after *Ponzi v. Fessenden* (*supra*), the Probation Act was passed (March 4, 1925, Public Law No. 596, Sixty-Eighth Congress 43 Stats. 1259, *supra*). By this Act the Federal courts were given the power to suspend a sentence and enlarge the convicted person on probation. While various courts, unthinkingly perhaps, persisted in applying "The Rule" when the convict was on probation and not imprisoned, it is obvious that such action ignores a vital distinction in degrees of custody and extends the operation of "The Rule" to a

status never contemplated by the Supreme Court in the formulation of "The Rule". When a criminal is safely incarcerated any conflict between sovereigns as to priority of punishment is largely academic as far as the public is concerned because no matter which sovereign prevails the criminal will be punished (usually imprisoned). In that event the first sovereign having actual physical custody of the criminal can, by reason of the absolute control inherent in, incarceration safely exhaust its remedies against him without endangering the public. In such case the wisdom of "The Rule" of the exclusiveness of first acquired jurisdiction is apparent. If the second sovereign desires to punish the criminal it can do so either by "borrowing" him for purposes of prosecution or by waiting till the expiration of his term of *imprisonment*. In neither case does the public suffer since at all times the criminal is in the absolute custody and control of one of the sovereigns.

A different situation obtains where the first sovereign seeks to exercise its remedies by putting the criminal upon probation. Even though the fiction of custody be indulged it is evident that the safety which inures to the public when the criminal is in jail does not prevail when he is free, to roam the streets. Requiring him to report monthly or semi-monthly to a probation officer, while technically a control of sorts, does not guarantee to the second sovereign and the citizenry at large, that degree of protection which imprisonment assures. By its act of exposing the second sovereign to future depredations of the probationer, the first sovereign subordinates its interest in the rehabilitation of the probationer to the interest of the second sovereign in protecting the public and vindicating its laws. There is no immunity, there can be no immunity.

## III.
## Examples.

Both in Judge Chamber's initial dissenting opinion and in the memorandum of the United States filed in support of the petition for rehearing *en banc,* certain questions were raised as to the operation of the law under the majority opinion. It is submitted that a complete answer to said questions is presented by adoption of the contention of the *amicus curiae* that a person enlarged upon probation is not in that degree of custody of the sentencing court as will warrant it in maintaining jurisdiction to the exclusion of a second jurisdiction desiring to prosecute —in short, that federal probation carries no cloak of immunity from state prosecutions and vice versa. These questions are briefly considered.

### (a)

**Q. "Suppose a state probationer violates the federal kidnapping statute. The Federal Bureau of Investigation finds the kidnapper. Can its officers arrest the culprit? Must they get the permission of a state judge to arrest him? If they can arrest him but must get permission to prosecute, how long can they hold the kidnapper while they wait for permission? If the judge who hears the habeas corpus decides the other jurisdiction should prosecute, then may the prisoner appeal claiming an abuse of discretion?"**

(First dissenting opinion 233 F. 2d 598, 608.)

If, as the United States claims, probation confers no immunity from prosecution the Federal Bureau of Investigation could arrest the kidnapper even as they could arrest any nonprobationer for the same crime. Since the state had subordinated its rights to rehabilitation by putting the kidnapper on probation, it would not be necessary to get the permission of the state to arrest him or

to prosecute him once personal jurisdiction (or custody) was secured. Since the probationing jurisdiction (state in the example) has rights inferior to the arresting jurisdiction (federal), no decision would be made regarding the forum of prosecution. The prisoner would be arraigned and tried in the arresting jurisdiction and there would be no right to appeal not available to any other prisoner.

(b)

**Q. "Can a juvenile state probationer go out, rob a national bank, get caught by the Federal Bureau of Investigation, and then taunt his arrestor with 'You can't arrest me. You can't prosecute me. My juvenile judge said you couldn't touch me.'"**

(First dissenting opinion 233 F. 2d 598, 609.)

The taunt might be made but since the juvenile judge has, under the theory here advanced, by placing the juvenile on probation, made the juvenile subject to the law enforcement of the other sovereign equally with the large majority of the citizenry, no objection could be interposed by the juvenile judge or the state to federal prosecution for violation of the bank robbery statute.

(c)

**Q. "Will we deny the great writ [habeas corpus] to one who commits the state offense after he goes on federal probation but grant it if his state offense precedes his federal offense in point of time?"**

(First dissenting opinion 233 F. 2d 598, 609.)

This question admittedly presents a logical distinction which cannot be overlooked. It can be persuasively argued that even assuming the validity of the argument herein advanced, for crimes committed by the probationer sub-

sequent to his release on probation, crimes against the second sovereign committed prior to the probation order could well be held to be considered by the probationing judge at the time he made the order. It is submitted that the probationing judge should not in logic consider accusations of former unproved crimes at the time he grants probation.

A person under consideration for probation who is accused of committing prior unproven crimes, should, under the presumption of innocence, be entitled to have the determination of his probation made without reference to such claimed crimes.

To attempt to draw a distinction on the basis of the priority of crimes would, in the words of the dissent, truly be, "a bucket of eels." It is, therefore, submitted that in the interests of the administration of criminal justice, no distinction be drawn between crimes against the second sovereign committed prior to or subsequent to the order of probation. There being no immunity in probation, the probationer in either case should be susceptible to apprehension, prosecution and incarceration subsequent to the probation order.

(d)

**Q. "Suppose the federal probation is in San Diego and the subsequent state offense and arrest are in Alameda County, California, in the Northern District of California. The application for habeas corpus must be made in the United States District Court for the Northern District. How will that work? Will a judge of the federal court in the Northern District exercise the Southern District's . . . discretion as to whether state prosecution should go ahead?"**

(First dissent 233 F. 2d 598, 609.)

Under the theory propounded here, the only exercise of discretion by the probationing court occurs at the time it elects to admit the defendant on probation. By this act, as has been stated above, the court loses the requisite degree of custody over the probationer to allow it to object to prosecution by another sovereign having jurisdiction. The interest of the probationing sovereign must then recede before the interest the second sovereign has in enforcement of its laws and protection of its citizens. Accordingly, the second sovereign (the state in this example) would have jurisdiction to try and imprison the probationer. Jurisdiction being present habeas corpus would not lie and since the interest of the probationing sovereign is inferior to that of the prosecuting sovereign, there would be no discretion in the courts of the probationing sovereign to decide which sovereign should prosecute. That question would have been decided by virtue of the above, and the second sovereign's possession of the probationer.

(e)

**Q. "Whether the jurisdiction of the second sovereign to detain and try a probationer of the first sovereign prevails in absence of express assent by the first sovereign?"**

(Second dissent 235 F. 2d 756, 759.)

If the second sovereign has gained personal jurisdiction or possession over a probationer of the first sovereign, it possesses a right to vindicate its laws in protection of its citizenry which is superior to the right of the first sovereign to rehabilitate the probationer. Therefore, the jurisdiction of the second sovereign to try a probationer of the first sovereign not only prevails in absence of the express assent by the first sovereign but prevails even in the face of an objection by the first sovereign.

(f)

**Q. "Whether probation from the first sovereign completely insulates the probationer from prosecution by subsequent sovereigns during the term of his probation?"**

(Second dissent 235 F. 2d 756, 760.)

This question is, of course, basic to the theory expresed herein by the United States. In conformance with the views hereinabove expressed, it can only be reiterated that probation carries with it no insulation from apprehension, prosecution, and imprisonment by subsequent sovereigns.

(g)

**Q. "Whether a person on probation is to be considered in the custody of the law for all purposes?"**

(Second dissent 235 F. 2d 756, 760.)

This aspect of the case has been discussed at length above. In recapitulation it can be said that custody or the absence of it is not all black nor all white. There are varying shades of gray. While the conceptualistic theory gives rise to the legal fiction that one on probation from a court is "in custody" to the same extent as one in prison by order of court, such is obviously not the case. Control and regulation, quite real where the person is imprisoned, are, in the case of a probationer, likewise legal fictions. A person held in physical confinement has the requisite "custody" to test his confinement by habeas corpus. A person enlarged upon probation does not. *United States v. Bradford* (2d Cir., 1951), 194 F. 2d 197, *supra.*

The conclusion is inescapable that while from a theoretical standpoint we may speak of "custody" as regards one on probation, from a practical standpoint the degree

of custody can differ vastly. A man walking the street on probation is not in the same degree of custody as a man held in an isolation cell at Alcatraz. The fictional custody of probation is not of the sort contemplated by the Supreme Court during the development of "The Rule."

## Conclusion.

It is a well established rule that between sovereigns asserting criminal jurisdiction over a person, the first sovereign to attain custody (and hence personal jurisdiction) of the person retains the right to exhaust its remedies against that person even to the exclusion of other sovereigns who attempt to intervene. This rule is not jurisdictional but is based on comity and is the keystone to the operation of compatible state-federal criminal justice. This rule evolved in this country during the last century and, since probation was unknown to the federal system during that period, contemplated only cases where the person was in actual physical custody. In 1925, the probation act came into force, thus allowing federal courts the option of incarcerating a convict or admitting him to probation. Since an incarcerated convict was *in custodia legis* from the court which sentenced him, the conceptualistic view gave rise to the legal fiction that a probationer was likewise in the custody of the law. The conflict in this case springs from the attempt to reconcile the rule on priority of jurisdiction with the legal fiction that one on probation is in the full custody of the law. If the fiction is valid a probationer is surrounded by a cloak of immunity to prosecution by a second sovereign save with the permission of the first sovereign. It is the position of the government that this result is wrong and is dangerous. Where the result reached by the fiction is unseemly, the fiction must give way. Accordingly, it

is urged that by granting probation a court impliedly consents to necessary prosecutions by a second sovereign whose laws the probationer violates. Since the first sovereign can no longer control the actions of the probationer, its interest in his rehabilitation is subordinate to the interest of the second sovereign in vindicating its laws and protecting its citizenry. Therefore, the degree of custody the probationing sovereign has over the probationer is not sufficient to enable it to invoke the rule of comity and prohibit apprehension, prosecution and incarceration of the probationer by a second sovereign. This is true whether the offense against the second sovereign is committed prior or subsequent to the probation order.

*Grant v. Guernsey* (10th Cir., 1933), 63 F. 2d 163, a leading case on identical facts is inconsistent with these views, and it is the position of the United States that it should be disapproved by this honorable court.

In view of the premises, the instant case should be reversed.

Respectfully submitted,

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